BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAUL ZAPATA	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 168,211 & 177,505
	)	
IBP, INC.	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Both claimant and respondent requested Appeals Board review of Administrative Law Judge Brad E. Avery's July 9, 1999, Award upon Remand. On November 16, 1999, the Appeals Board heard oral argument by telephone conference. Stacy Parkinson was appointed Appeals Board Member Pro Tem to serve in place Appeals Board Member Gary M. Korte who recused himself from the proceeding.

APPEARANCES

Claimant appeared by his attorney, Diane F. Barger of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Jennifer L. Hoelker of Dakota City, Nebraska. The Kansas Workers Compensation Fund (Fund) appeared by their attorney, Michael C. Helbert of Emporia, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

Docket No. 168,211

Administrative Law Judge Jon L. Frobish entered the first Award in this case on April 21, 1998. The Administrative Law Judge denied claimant workers compensation benefits for an alleged May 30, 1992, injury to his low back while employed by the respondent. The Administrative Law Judge concluded claimant's testimony was not credible and the record was replete with inconsistences. The Administrative Law Judge found claimant had failed to sustained his burden of proving he injured his low back while he was employed by the respondent.

The Appeals Board, however, in an Order entered on April 30, 1999, disagreed with the Administrative Law Judge and found claimant was consistent at the various times in the record when he described the May 30, 1992, accident. Further, claimant was consistent in his description of the accident in the history he related to both treating and examining physicians and all the physicians attributed claimant's low-back injury to the May 30, 1992, work-related accident.

The Appeals Board remanded Docket No. 168,211 to the Administrative Law Judge to address the remaining outstanding issues.

In the July 9, 1999, Award upon Remand, that is the subject of this appeal, the Administrative Law Judge found claimant had given respondent timely notice of accident; claimant's average weekly wage was $346.30 based on a five-day work week; and claimant was entitled to an eight percent permanent partial general disability based on permanent functional impairment.

On appeal, claimant contends, although he returned to work following his low-back injury at comparable wage, that he is entitled to a much higher permanent partial general disability award based on a work disability. Additionally, claimant argues he established that the respondent expected him to work on Saturdays. Therefore, claimant contends his average weekly wage should be computed based on a six-day work week instead of a five-day work week.

In contrast, respondent, in its application for review and at oral argument, basically only argued issues raised and applicable to Docket No. 177,505. But the respondent's brief filed before the Appeals Board, which is essentially the same brief filed in the prior appeal before the Appeals Board, lists issues of compensability; notice and prejudice; average weekly wage; nature and extent of disability; and Fund liability. In regard to Fund liability, however, the respondent dismissed the Fund with prejudice in this docket number in an Order of Dismissal approved by the parties and entered by the Administrative Law Judge on October 11, 1996.

Docket No. 177,505

In the July 9, 1999, Award upon Remand, the Administrative Law Judge found claimant gave respondent timely notice of accident; claimant's average weekly wage was $360.95 based on a five-day work week; claimant was entitled to a 21.5 percent permanent partial general disability; respondent was not entitled to a credit under K.S.A. 44-501(c) or K.S.A. 44-510a; Fund liability was denied; claimant's motion for interest was denied; claimant was awarded future medical care upon application and approval; and claimant is entitled to unauthorized medical expenses up to the statutory limit.

On appeal, claimant contends the Administrative Law Judge erred in finding claimant's appropriate accident date was his last day worked of May 10, 1995. Claimant also argued that this average weekly wage should be computed on a six-day work week instead of a five-day work week, and he is entitled to a 65 to 70 percent permanent partial general disability based on a work disability.

In contrast, respondent agrees with the Administrative Law Judge that claimant's appropriate accident date is his last day worked of May 10, 1995. Respondent contends, since May 10, 1995, is claimant's accident date, then claimant has failed to prove a work disability because the record does not contain a physician's opinion on claimant's loss of ability to perform work tasks.[1] Furthermore, respondent argues claimant is not entitled to a work disability award because his current permanent work restrictions are the same restrictions imposed because of his previous bilateral carpal tunnel syndrome condition.

DOCKET NO. 168,211

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board makes the following findings and conclusions:

The Appeals Board concludes there is no reason to repeat the findings and conclusions that are set forth in its April 30, 1999, Award. Those findings and conclusions are, therefore, adopted and made part of this Order as if specifically set forth herein.

NATURE AND EXTENT OF DISABILITY

The Appeals Board agrees with the Administrative Law Judge and concludes that claimant is not entitled to a work disability award for the May 30, 1992, low-back injury. After the May 30, 1992, accident, claimant continued to work for the respondent earning a comparable wage[2]. Respondent did take claimant off work in 1994 because the respondent could not accommodate claimant's permanent work restrictions that were a combination of restrictions for his low-back injury along with restrictions for his neck and

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[1] *See* K.S.A. 44-510e(a).

[2] *See* K.S.A. 1991 Supp. 44-510e(a).

shoulder injuries. Claimant was paid temporary total disability benefits for that period until respondent again returned claimant to work at a comparable wage on January 23, 1995. Accordingly, claimant's permanent partial disability benefits for his May 30, 1992, low-back injury are limited to his permanent functional impairment rating.

Three physicians, all who testified in this case, expressed opinions on claimant's permanent functional impairment as a result of his low-back injury. Respondent had claimant examined and evaluated by Philip R. Mills, M.D., a physical medicine and rehabilitation physician. The doctor found claimant had sustained a low-back strain at work on May 30, 1992. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), he assessed claimant with a one percent whole body permanent functional impairment related to the low back. At claimant's attorney's request, claimant was examined and evaluated by Aly M. Mohsen, M.D., a physical medicine physician, on October 21, 1993. Dr. Mohsen found claimant to have superimposed myofasical pain syndrome involving the scapulocostal and lumbar areas of the spine. Based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), he assigned an eight percent whole body impairment for claimant's low-back condition. The Administrative Law Judge appointed P. Brent Koprivica, M.D., board certified as an independent medical examiner, to provide an independent medical examination of claimant. Dr. Koprivica saw claimant on October 2, 1995. In accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Koprivica likewise assessed claimant with an eight percent whole body functional impairment related to the low-back injury.

The Administrative Law Judge awarded claimant an eight percent permanent partial general disability based on Dr. Koprivica's eight percent permanent functional impairment rating. The Appeals Board agrees with the Administrative Law Judge and affirms the Administrative Law Judge's award entitling claimant to an eight percent permanent partial general disability.

AVERAGE WEEKLY WAGE

In regard to claimant's average weekly wage, the Administrative Law Judge found the wage should be computed based on a five-day work week. But the claimant argues he proved the respondent expected him to work on Saturdays. Therefore, based on the Tovar[3] case, claimant's average weekly wage should be computed based on a six-day work week.

The only evidence contained in the record as to this issue is claimant's testimony and the wage statements admitted into evidence at the regular hearing. Claimant testified he was expected and did work on Saturdays. The wage statement admitted into the record shows the 26-week period preceding claimant's May 30, 1992, accident. It shows that

[3]Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

claimant only worked overtime in five weeks of that 26-week period. One of those weeks, during that period, claimant only worked .25 of an hour of overtime for the entire week. The wage statement does not show or identify whether the overtime claimant worked was daily or Saturday overtime. In Tovar, claimant not only proved he was expected to work overtime but also proved he did regularly work overtime. In this case, the Appeals Board concludes claimant failed to establish how much of the overtime he worked was worked on Saturdays as opposed to his regular work days. Therefore, the Appeals Board concludes claimant's average weekly wage should be based on a five-day work week instead of a six-day work week.

The employer's cost of fringe benefits, which included the amount of yearly bonus and profit sharing paid to claimant for 1992, was introduced in the record by stipulation of the parties. But because claimant remained employed after the May 30, 1992, low-back injury, those fringe benefits were not discontinued and should not be included in claimant's average weekly wage for this accident.[4] The Appeals Board finds, as did the Administrative Law Judge, that claimant's average weekly wage for the May 30, 1992, work-related accident is $346.30.

All other findings and conclusions contained in the Administrative Law Judge's July 9, 1999, Award upon Remand that relate to Docket No. 168,211 with a date of accident of May 30, 1992, are adopted by the Appeals Board.

AWARD DOCKET NO. 168,211

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Brad E. Avery's July 9, 1999, Award upon Remand, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Saul Zapata, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred May 30, 1992, and based upon an average weekly wage of $346.30.

Claimant is entitled to 17 weeks of temporary total disability compensation[5] at the rate of $230.88 per week or $3,924.96, followed by 398 weeks at the rate of $18.47 per week or $7,351.06 for an 8% permanent partial general disability, making a total award of $11,276.02.

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[4] *See* K.S.A. 1991 Supp. 44-511(a)(2).

[5] The stipulated weekly temporary total disability benefits paid claimant were not separated between the two docketed claims. Apparently there were 34 weeks total paid in both cases. However, respondent's counsel represented to the Administrative Law Judge that the two injuries had been treated as one and the amounts had been lumped together. The Administrative Law Judge was unable to find any clarification in the record, and therefore, the Administrative Law Judge divided equally the 34 weeks between the two cases.

As of August 31, 2000, the entire amount is due and owing and ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award upon Remand that are not inconsistent with the above.

DOCKET NO. 177,505

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board makes the following findings and conclusions:

DATE OF ACCIDENT

The Administrative Law Judge found the appropriate accident date for claimant's alleged series of accidents was May 10, 1995, claimant's last day worked. Claimant originally plead injuries to his neck and shoulders resulting from performing his regular work activities while employed by the respondent from March 1993 through May 1993. Claimant contends the parties stipulated to a March 1993 through May 1993 accident date.

Claimant also contends the Appeals Board in its April 30, 1999, Order found claimant's accident date was March 1993 through May 1993. Further, claimant argues there is no evidence in the record that claimant's neck and shoulder injuries worsened after respondent returned claimant to work on January 23, 1995.

Claimant first started having symptoms in both his shoulders while performing the cleaning chains job for respondent in March 1993. This job required claimant to reach over his head with both hands and to repetitively use his hands and arms at a fast pace.

Because of these symptoms, respondent sent claimant for examination and treatment to orthopedic surgeon Lowry Jones, Jr., M.D. Dr. Jones diagnosed claimant with thoracic outlet syndrome caused by repetitive overuse, muscular tension, and poor posturing. Dr. Jones opined the cleaning chains job that required claimant to perform repetitive work activities was the cause of the thoracic outlet syndrome. The doctor treated claimant conservatively, and claimant was released from treatment on September 20, 1993, with permanent restrictions limiting his lifting, gripping, pushing, and reaching above shoulder level to an occasional basis.

Respondent, however, returned claimant to a job that required claimant to work outside Dr. Jones' permanent restrictions. After a December 23, 1993, preliminary hearing, the Administrative Law Judge ordered the respondent to either find claimant a job within Dr. Jones' permanent restrictions or take claimant off work and pay him weekly temporary total disability benefits.

Respondent decided it could not accommodate claimant's permanent restrictions at that time and placed claimant on a temporary leave of absence. Respondent then returned claimant to work on January 23, 1995. Claimant was returned to a job requiring him to repetitively grip, repetitively use a knife, and to lift above shoulder level. While performing this job, claimant's shoulders again became symptomatic. Claimant reported the symptoms to his supervisor. Respondent took claimant off work on May 10, 1995, because of his recurring symptoms. Claimant's last day worked was May 10, 1995, as respondent never offered claimant employment within his permanent restrictions.

During the litigation of this claim, the Court of Appeals in the Berry[6] case held, where an injured worker is required to stop working as a direct result of pain and disability resulting from the injury, the date of accident in a repetitive trauma case is the last day claimant performed services for his or her employer. The claimant argues the Berry case does not apply because the parties stipulated the date of accident for claimant's neck and shoulder injuries was March 1993 through May 1993. The Appeals Board finds no such stipulation in the record.

Respondent has throughout this litigation denied that claimant suffered neck and shoulder injuries while performing repetitive work activities for the respondent from March 1993 through May 1993. In fact, in its submission letter to the Administrative Law Judge filed February 2, 1998, respondent argued, since the claimant had alleged he was injured by a series of accidents and his last day worked was in May 1995, claimant had failed to prove work disability because he had failed to present any evidence in the opinion of a physician on his loss of ability to perform work tasks. The other component of the work disability test effective after July 1, 1993, is the wage loss determined by the difference between post-injury and pre-injury wages.

The Appeals Board in its April 30, 1999, Order did conclude claimant had proven his repetitive work activities from March 1993 through May 1993, as alleged by the claimant, had caused claimant to suffer permanent neck and bilateral shoulder injuries. But the Appeals Board also found respondent had returned claimant, after Dr. Jones had treated claimant from July 1993 through September 1993, to jobs both in 1993 and 1995 that violated Dr. Jones' permanent restrictions of repetitive gripping, pushing, and reaching above shoulder level.

The Berry case was decided in 1994 since then, the appropriate accident date for an employee injured while performing repetitive work activities, unless stipulated by the parties, has been decided based on the principles set forth in Berry. The administrative

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[6]Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). *See also* Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995) (injuries other than carpal tunnel syndrome injuries caused by continuing repetitive work activity over a period of time are subject to the principles announced in Berry) and Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999) (the accident date for a repetitive use injury is the last date claimant performs services or work for the employer or is the date the claimant is unable to continue a particular job and moves to an accommodated job).

law judges, the Appeals Board, and the appellate courts have found accident dates that are different than that alleged by claimants in cases decided after Berry.[7] The Appeals Board has previously found, and does so here, that the Administrative Law Judge may and should amend the accident date when the evidence so dictates.[8]

Respondent returned claimant to work on January 23, 1995, to a job that required claimant to repetitively grip, repetitively use a knife, and reach above shoulder level. Those activities were in contradiction to Dr. Jones' restrictions. As a result, claimant became symptomatic, and when he notified the respondent of his symptoms, he was immediately taken off work. During Dr. Koprivica's deposition testimony, he was given a description of the job that claimant performed from the time he was returned to work on January 23, 1995, until he was taken off work by the respondent on May 10, 1995. Dr. Koprivica opined that job did not comply with claimant's permanent work restrictions.

The Appeals Board agrees with the Administrative Law Judge's conclusion that claimant's appropriate accident date for his neck and shoulder injuries is May 10, 1995, the last day claimant worked before he was terminated because the repetitive work activities aggravated his neck and shoulder conditions.

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[7] *See*, e.g., Treaster; Lott-Edwards v. Americold Corp., No. 82,555 27 Kan. App. 2d ____ (June 22, 2000); and Durham v. Cessna Aircraft Co., 24 Kan. App. 2d 334, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997).

[8] *See* Davenport v. Hallmark Cards, Inc., WCAB Docket No. 165,642 (July 1998).

WORK DISABILITY

The Appeals Board also agrees with the Administrative Law Judge that claimant's neck and shoulder injuries entitle him to an award based on a work disability. The work disability test for a May 10, 1995, accident is the percentage of the loss of claimant's ability to perform work tasks he performed in employment in the 15-year period next preceding the accident, average together with the difference between claimant pre-injury and post-injury average weekly wage.[9]

Respondent argues claimant's permanent work restrictions that were recommended by Dr. Jones are essentially the same work restrictions that were imposed by Dr. Delgado, Dr. Hopkins, and Dr. Wertzberger when claimant settled his bilateral carpal tunnel syndrome case in 1992. Accordingly, respondent argues that claimant does not have any additional permanent work restrictions and therefore does not have either a work task loss or a wage loss based on his neck and shoulder injuries.

The Appeals Board finds the record established that the claimant, following the settlement of his bilateral carpal tunnel syndrome claim, was placed on jobs by the respondent that exceeded those restrictions. The Appeals Board also finds claimant's neck and shoulder injuries resulted from claimant performing jobs that exceeded the permanent work restriction of no repetitive activities. Therefore, since claimant performed work that exceeded his permanent restrictions, the Appeals Board concludes those restrictions are not to be considered in determining claimant's current work disability.[10]

There is no opinion by a physician contained in the record on claimant's loss of work task performing ability. The Appeals Board finds, as did the Administrative Law Judge, there is evidence in the record as to the second prong of the work disability test and that is the difference between claimant's post-injury average weekly wage and his pre-injury average weekly wage. In determining claimant's wage loss, a finding also has to be made of whether claimant made a good faith effort to find appropriate post-injury employment.[11]

Claimant established, at the regular hearing, that after his last day worked of May 10, 1995, he regularly returned to the respondent and at respondent's direction, bid on jobs through April 3, 1996. Additionally, claimant presented a list of employers he had contacted for employment through October 28, 1995. Furthermore, claimant testified, at the continuation of the regular hearing held on May 29, 1996, that he had, the day before the hearing and in the week before the hearing, traveled to Topeka, Kansas, and applied for jobs at various employers.

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[9] *See* K.S.A. 44-510e(a).

[10] *See* Carver v. Missouri Gas Energy, WCAB Docket No. 195,270 (July 1997).

[11] *See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Administrative Law Judge found there was no evidence in the record that claimant had made a good faith effort to find appropriate employment. The Administrative Law Judge, therefore, imputed to claimant an average weekly wage based on the present minimum wage of $5.15 per hour or $206.00 per week. The Appeals Board disagrees with the Administrative Law Judge.

The Appeals Board finds claimant has established, through his testimony and various supporting documentation admitted into evidence at the regular hearing and the continuation of the regular hearing, that he did make a good faith effort to find appropriate employment but so far has been unsuccessful in obtaining work. Claimant's evidence on this issue is conclusive as the respondent has not contradicted the evidence or shown that the evidence is untrustworthy.[12]

Accordingly, the Appeals Board concludes claimant's wage loss component of the work disability test is 100 percent. Averaging a zero percent work task loss with a 100 percent wage loss equals a 50 percent work disability.

CREDIT FOR PREEXISTING FUNCTIONAL IMPAIRMENT

The version of K.S.A. 44-501(c), in effect for the May 10, 1995, accident date, provides as follows:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

As previously found above, the primary reason claimant is no longer able to perform work for the respondent is not because of his low-back injury and permanent restrictions but is the result of his injuries to his neck and shoulders and the resulting permanent restrictions. Although claimant testified he continued to have low-back symptoms, the reason respondent removed claimant from work was because of recurring neck and shoulder symptoms. The Appeals Board finds the reason claimant in not able to perform repetitive work activities for respondent and the reason claimant is otherwise not able to find employment is primarily the result of his neck and shoulder injuries and not his low-back injury.

K.S.A. 44-501(c) provides for the injured worker's resulting disability to be reduced by his preexisting functional impairment, only if, the injured work's preexisting condition is aggravated and the aggravation causes increased disability. In this case, the Appeals Board concludes there is no evidence that claimant's preexisting low-back injury was

[12] *See* Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978).

aggravated after claimant was returned to work on January 23, 1995, and then was removed from work by the respondent on May 10, 1995, because of recurring symptoms in his shoulders.

The Appeals Board, therefore, agrees with the Administrative Law Judge and finds the record does not contain any evidence that respondent is entitled to reduce claimant's 50 percent work disability by his preexisting functional impairment that resulted from the May 30, 1992, low-back injury.

AVERAGE WEEKLY WAGE

Since there is no evidence in the record to establish claimant's average weekly wage for the May 10, 1995, accident date, the Appeals Board finds the wage statement and stipulations entered for fringe benefits, bonus, and profit sharing payments for a May 15, 1993, accident date will be considered in determining claimant's average weekly wage for the May 10, 1995, accident date. Again, as previously found above in regard to Docket No. 168,211, claimant's average weekly wage should be computed based on a five-day work week instead of a six-day work week. Claimant failed to prove how much of the overtime included in the wage statement was for overtime worked on Saturdays. In this case, the amounts contained in the stipulation on the employer's cost of fringe benefits in the amount of $26.86 per week along with the stipulated weekly amounts paid in 1993 for bonus and profit sharing of $14.26 per week should be added to the wage statement's $360.95 weekly amount because those fringe benefits were discontinued when claimant was terminated. The Appeals Board concludes claimant's average weekly wage for the May 10, 1995, accident is $402.07.

ALL OTHER ORDERS

In the Award upon Remand, the Administrative Law Judge denied claimant's motion requesting respondent to pay interest pursuant to K.S.A. 44-512b. At oral argument before the Appeals Board, the claimant dismissed his appeal of this issue.

The Appeals Board affirms and adopts as its own the Administrative Law Judge's findings that the Fund has no liability; that claimant is entitled to future medical upon application and approval of the Director; and that claimant is entitled to the statutory limit for unauthorized medical expense upon presentation of a statement for the expense.

The Appeals Board further approves and adopts the Administrative Law Judge's findings and conclusions as set forth in the Award upon Remand that are not inconsistent with the findings and conclusions set forth in this Order.

AWARD DOCKET NO. 177,505

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Brad E. Avery's July 9, 1999, Award upon Remand, should be, and is hereby, modified as follows.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Saul Zapata, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred May 10, 1995, and based upon an average weekly wage of $402.07

Claimant is entitled to 17 weeks of temporary total disability compensation[13] at the rate of $268.06 per week or $4,557.02, followed by 206.5 weeks at the rate of $268.06 per week or $55,354.39 for a 50% permanent partial general disability, making a total award of $59,911.41

As of August 31, 2000, the entire amount is due and owing and ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses are order paid by the respondent.

Claimant is entitled to future medical treatment upon application and approve of the Director.

Claimant is entitled to the statutory maximum of unauthorized medical expense upon presentation of the expense statement.

The Fund has no liability for any amounts paid in this docketed claim.

The Appeals Board adopts the remaining orders set forth in the Award upon Remand that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

[13]The stipulated weekly temporary total disability benefits paid claimant were not separated between the two docketed claims. Apparently there were 34 weeks total paid in both cases. However, respondent's counsel represented to the Administrative Law Judge that the two injuries had been treated as one and the amounts had been lumped together. The Administrative Law Judge was unable to find any clarification in the record, and therefore, the Administrative Law Judge divided equally the 34 weeks between the two cases.

BOARD MEMBER

BOARD MEMBER

DISSENT

DOCKET NO. 177,505

I respectfully disagree with the majority as fundamental fairness requires this claim be remanded for evidence of claimant's task loss. In the repetitive use injury claim, respondent did not raise the date of accident as an issue to be decided by the Administrative Law Judge. It did not become a disputed issue until the Administrative Law Judge made it an issue and decided it in the July 9, 1999, Award upon Remand.

Repetitive use injuries present special problems in determining the appropriate date of accident. Following creation of the bright line rule in the 1994 Berry[14] decision, the appellate courts have struggled and grappled with determining the date of accident of repetitive use injuries. In Berry, the Court of Appeals ruled that the last day worked would be the date of accident in repetitive trauma cases. Recognizing problems with that rule, Condon[15]clarified and modified the Berry rule. In Condon, the Court of Appeals ruled that the last day worked was not always the appropriate accident date when the injured worker left work for reasons other than the repetitive use injury. The Court of Appeals further modified Berry in the Alberty[16] decision. In Alberty, the Court of Appeals adopted the date that medical restrictions were implemented as the appropriate date of accident. And in Durham,[17] the Court of Appeals used the last day that claimant worked before undergoing surgery.

The Kansas Supreme Court addressed the problems with determining the date of accident in repetitive use injuries in Treaster.[18] In that case, the Supreme Court held the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker either (1) performs services or work for an employer

[14]Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[15]Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

[16]Alberty v. Excel Corp., 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. 821 (1998).

[17]Durham v. Cessna Aircraft Co., 24 Kan. App. 2d 334, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997).

[18]Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

or (2) is unable to continue a particular job and moves to an accommodated position. Treaster can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position. The Court stated, in part:

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[19]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[20]

In Treaster, the Kansas Supreme Court also approved the principles set forth in Berry.

The Workers Compensation Act provides that the administrative law judges are not bound by technical rules of procedure. But the judges must act reasonably and without partiality, provide expeditious hearings, and provide the parties a reasonable opportunity to be heard and present evidence.[21] Because date of accident was not designated as an issue to be determined by the Judge, claimant has been unfairly caught by surprise and has been denied the opportunity to present evidence on that issue. Therefore, the claim should be decided by either (1) using the May 1993 date as the appropriate date of accident or (2) affording claimant an opportunity to present evidence as to the appropriate date of accident and the task loss for the potential accident dates. Otherwise, claimant is denied due process.

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BOARD MEMBER

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[19] Treaster, syl. 3.

[20] Treaster, syl. 4.

[21] K.S.A. 1999 Supp. 44-523(a); Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

c: Diane F. Barger, Wichita, KS
Jennifer L. Hoelker, Dakota City, NE
Michael C. Helbert, Emporia, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director